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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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PARKER TIRRELL AND IRIS TURMELLE

v.

FRANK EDELBLUT, ET AL

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24-cv-251-LM-TSM
November 21, 2024
10:41 a.m.

TRANSCRIPT OF FTR-RECORDED PRETRIAL CONFERENCE
BEFORE THE HONORABLE TALESHA SAINT-MARC

APPEARANCES:

For the Plaintiffs:

Chris Erchull, Esq.
GLBTQ Legal Advocates & Defenders

Henry Klementowicz, Esq.
ACLU of New Hampshire

For the Defendants:

(State defendants)

Michael P. DeGrandis, Esq.
Brandon Chase, Esq.
NH Attorney General's Office

(Pembroke School District)

Michael Eaton, Esq.
Wadleigh, Starr & Peters, PLLC

(Pemi-Baker Regional
School District)

Diane M. Gorrow, Esq.
Soule, Leslie, Kidder, Sayward
& Loughman

1 P R O C E E D I N G S

2 THE CLERK: This Court is now in session and has
3 before it for consideration a pretrial conference in the
4 matter of Tirrell, et al. versus Edelblut, et al., civil
5 number 24-cv-251-LM.

6 If counsel could please identify themselves for the
7 record, starting with counsel for the plaintiffs.

8 MR. ERCHULL: Chris Erchull for the plaintiffs.

9 THE COURT: Good morning.

10 MR. KLEMENTOWICZ: Good morning.

11 Henry Klementowicz from the ACLU of New Hampshire.

12 THE COURT: Good morning.

13 MR. DEGRANDIS: Good morning.

14 Michael DeGrandis with the Attorney General's
15 Office for the state defendants.

16 THE COURT: Good morning.

17 MR. CHASE: Brandon Chase with the Attorney
18 General's Office for the state defendants.

19 THE COURT: Good morning.

20 MR. CHASE: Good morning.

21 MR. EATON: Michael Eaton for the Pembroke School
22 District.

23 THE COURT: Good morning.

24 MS. GORROW: Diane Gorrow for the Pemi-Baker
25 Regional School District.

1 THE COURT: Good morning.

2 I appreciate you all accommodating us being in a
3 smaller courtroom today. We're a full house today, and so I
4 appreciate your being willing to sit back there without a
5 table.

6 All right. So we're here for a preliminary
7 pretrial conference.

8 I did review the parties' proposals, and it's clear
9 that you all are not agreeing on a timeline for this case. I
10 would like to hear a little more about the breakdown and, you
11 know, see if we can reach some kind of resolution.

12 And what it seems to me is that the plaintiffs are
13 looking for some way to get this case or get a good portion of
14 this case to happen before the school year starts again, and
15 there's some resistance on the state and local school
16 districts -- or maybe not the school districts because you all
17 are saying not my fight, right?

18 MS. GORROW: Right.

19 THE COURT: All right. So let's hear from
20 plaintiffs first.

21 MR. ERCHULL: Thank you, your Honor.

22 The plaintiffs are proposing an expedited schedule.
23 As you acknowledged, it's because we would like to see a trial
24 happen or a judgment happen before the start of the next
25 school year. That is because we are hearing from school

1 districts, including the school district defendants in this
2 case, that school districts and school boards are looking for
3 final resolution as soon as possible, and we feel -- we feel
4 like it's doable to get this case done before the start of the
5 next school year, although we acknowledge that's an expedited
6 timeline.

7 Previously the plaintiffs represented to this Court
8 that we were prepared to move expeditiously in this case.
9 That has not changed. It remains true.

10 And the state defendants have represented that they
11 intend to present expert evidence, and so on that basis we
12 don't believe it's likely that this case will be resolved on
13 summary judgment. So our schedule contemplates the
14 possibility of even foregoing summary judgment motions
15 altogether if that -- if that ends up being appropriate based
16 on, you know, what we learn through discovery.

17 To the extent that the state defendants are moving
18 to stay discovery, our position is that they have not met
19 their burden.

20 There's case law on this point. As Judge
21 McCafferty explained in a case in 2021, the defendants carry a
22 burden if they wish to stay discovery during the pendency of a
23 motion to dismiss.

24 Would you like the case cite for that?

25 THE COURT: Sure. Thank you.

1 MR. ERCHULL: Yeah, it's Drewniak versus U.S.
2 Customs, and it was published 563 F.Supp. 3d 1. And so, you
3 know, in that the Court discusses the burden that defendants
4 bear if they wish to stay discovery during the pendency of a
5 motion to dismiss.

6 There's case law that says that it could make sense
7 for a Court to look under the hood of the merits of a motion
8 to dismiss to conclude if it's likely to obviate the need for
9 discovery on any particular issue.

10 And very recently, in fact, Judge McCafferty
11 decided a motion in another case, 23-cv-523. It's Bernier
12 versus Turbocam. May 2, 2024, is Judge McCafferty's order
13 denying a motion to stay discovery in another matter because
14 the defendants were unable to meet their burden to show that
15 staying discovery was appropriate.

16 In the amended complaint that the plaintiffs filed
17 there is nothing new that would warrant staying discovery. Of
18 course the defendants have every right to file a motion to
19 dismiss the first amended complaint. However, it is the
20 plaintiffs' position that any arguments that could have been
21 raised in response to the original complaint have been waived
22 because they were not argued, you know, at the time.

23 The state defendants make a point that the
24 complaint was amended after pleadings had closed, but it's our
25 position that it's not at all unusual to amend a complaint

1 even after discovery has been initiated. And in fact, you
2 know, we did it within our Rule 15 timeline to file an amended
3 complaint. And, in addition, it's perfectly common in
4 discovery plans, including the discovery plan proposed by the
5 state defendants, to contemplate amended pleadings.

6 There are no new facts alleged in the first amended
7 complaint. There are no new legal claims. The only material
8 change goes to the scope of relief, and the scope of relief is
9 not grounds for dismissal on a 12(b)(6) motion.

10 More importantly, there is nothing about the change
11 in scope of relief that affects the scope of discovery.

12 So the state's view of discovery changes -- I mean,
13 we accept that that's what they represent due to the facial
14 claim but they have not shown how it goes to their purported
15 motion to dismiss or how that warrants a stay, and so we don't
16 think that a stay of discovery is warranted in this case.

17 And, you know, a review of Judge McCafferty's order
18 on the motion for preliminary injunction will show that
19 there's not really any legal basis under which a motion to
20 dismiss is likely to prevail.

21 THE COURT: All right. Thank you.

22 MR. ERCHULL: That's all. Thank you, your Honor.

23 THE COURT: All right. Attorney DeGrandis.

24 MR. DEGRANDIS: Good morning, your Honor.

25 I just have three main points to make to give the

1 Court some context for our position on the matter.

2 First, is that it's very early in this particular
3 case process and the procedural posture of this case to enter
4 a scheduling order in the first place, and I would like to
5 address that.

6 I would also like to address the plaintiffs'
7 proposal which we believe to be unrealistic.

8 I would also like to point out just certain
9 features of the state defendants' proposal that makes it a
10 much more realistic and doable schedule than what the
11 plaintiffs are proposing here.

12 As far as the early nature of this case, there's a
13 lot of uncertainty surrounding this case. We don't know the
14 scope of discovery. We don't know the scope of the burdens of
15 trial either with the addition of this facial claim. The
16 facial claim is much more than what the plaintiffs present it
17 to be. It is more than just a change to the scope of a
18 remedy. I mean, this is a fundamental change to the whole
19 nature of the case.

20 They are now arguing -- unlike their original
21 complaint which was only an as-applied challenge, now they're
22 saying that HB 1205 under no set of circumstances can lawfully
23 prohibit a biological boy from playing girls' sports. That is
24 a mammoth difference.

25 And the First Circuit has told us that facial

1 challenges are more complex, they are more probative, because
2 they are making a sweeping challenge to every application
3 possible.

4 That's very different from what was going on in the
5 first complaint. It's very different from what is going on in
6 the first amended complaint here as it relates to the
7 as-applied challenge where we have two plaintiffs with very
8 specific, very unique circumstances to support that claim.

9 Now that has to be extrapolated. Those facts --
10 those alleged facts have to be extrapolated to the entire
11 population. So that leaves a lot of open questions regarding
12 what is the scope of discovery and what will the burdens of
13 trial be in that respect.

14 So we don't know even how many experts. I think
15 this probably will be an expert-heavy case, but only probably.
16 We don't really know the end result of our responsive pleading
17 and how the Court views that responsive pleading. This would
18 require a different defense strategy.

19 We need a realistic schedule. So if the Court is
20 inclined to enter a scheduling order today, we would ask the
21 Court to please consider this dynamic of the uncertainty and
22 build, you know, extra time in to consider that.

23 With respect to the second point I wanted to make
24 regarding context, the plaintiffs' proposal is profoundly
25 unrealistic, and I'll just point to two examples of that.

1 First, when you look at the expert report exchange,
2 the plaintiffs proposed simultaneous exchange of expert
3 reports. That's crazy. Courts only allow that in rare
4 circumstances where there wouldn't be prejudice to the
5 defendants.

6 Here the state defendants don't know what experts
7 are going to opine upon on the plaintiffs' side in the first
8 place. It's standard to have 90 days for a defendant to
9 address that, and I think that's really important. Their
10 schedule is unrealistic in that respect and fundamentally
11 unfair.

12 The second point I would make is that the
13 plaintiffs' discovery plan hasn't seriously contemplated the
14 dynamics of this case.

15 And I'll just point out -- you'll see it in a
16 number of different elements within their proposed plan, but
17 I'll just point out four sections on pages 2 and 3; theory of
18 liability, theory of defense, injunctive relief, and questions
19 of law. In none of those do the plaintiffs even raise their
20 own facial challenge. They don't bring those up at all. The
21 facial challenge is a different claim, and that is one of the
22 questions of law that the Court is going to have to ask,
23 whether it be in a motion to dismiss, motion for summary
24 judgment, or on the merits at a trial. Either way that's an
25 important dynamic to consider, and the plaintiffs I don't

1 think considered that in their requests here.

2 When we look -- and I won't go through -- in
3 advocating for the state defendants' schedule, I won't go
4 through it line by line, but I would like to point out some of
5 its features that make it more realistic and I think fairer
6 for all of the parties.

7 First and foremost, with respect to the expedited
8 schedule. Under local rule 40.1 an expedited schedule
9 requires the consent of the parties. Well, we don't consent
10 to that. We don't think that that's fair to the state
11 defendants, and it would be prejudicial to our ability to
12 defend the validity of the statute.

13 The trial dates are seven months apart. That is a
14 big difference between where the defendants are and where the
15 plaintiffs are.

16 But in this particular instance the plaintiffs have
17 all of the relief they were looking for. Again, there are two
18 plaintiffs. Parker and Iris have successfully secured a
19 preliminary injunction. They may play sports as they wanted.

20 The urgency -- I should say the exigency is no
21 longer on the side of the plaintiffs. The urgency is actually
22 on the side of the state defendants because we are not able to
23 enforce the law as to those two plaintiffs.

24 We want to try this case to get this case to a
25 final resolution as quickly as possible, but we don't want to

1 do that in such a fast, hasty manner that it prejudices our
2 ability to defend the statute. So we do require some time.

3 Again, not knowing the scope of discovery and the
4 scope of demands on trial is why we build in this extra time.
5 We don't know when our responsive pleading will be considered
6 by the Court. It could be we have resolution in January or
7 even as late as February, and that really informs most of the
8 difference in how we're -- that and of course the expert
9 disclosures is really the source of most of the difference
10 between the schedules proposed by the plaintiffs and by the
11 defendants.

12 Just a couple of other things here about our
13 proposal. I just wanted to clarify that, you know, we ask --
14 in the motions to dismiss section we state only upon the
15 Court's invitation. Of course that's not to prejudice any of
16 the defendants' ability to move to dismiss the first amended
17 complaint. That would be after those are decided. If the
18 plaintiff later chooses to amend their complaint, that's
19 really what that's in reference to.

20 As far as the expert reports are concerned, as I
21 mentioned before, not to belabor the point, but we would ask
22 for 90 days to do that. Again, we don't know -- it's possible
23 we could do it faster certainly, 75 days, maybe even 60 days,
24 but not knowing how many experts we're going to need, at this
25 time we think 90 days is a reasonable time span. And if the

1 Court were to disagree with that and ask the defendants to
2 file their expert reports in a shorter time period, we would
3 ask the Court then to perhaps build in some time so that the
4 defendants could also file expert rebuttal reports. That may
5 sort of cushion the blow and enable us to adapt to a slightly
6 shorter timeline.

7 As far as the issue of staying discovery, I haven't
8 read the case that Attorney Erchull referenced here today,
9 cited here today, but my understanding for all of those cases
10 where a defendant has to demonstrate the need, a particular
11 need to stay discovery and that typically discovery is not
12 stayed during the pendency of a motion to dismiss, that's my
13 point about this being very early in the stages of litigation
14 for even a scheduling order.

15 There is no pending motion to dismiss. We have not
16 filed our responsive pleading yet. So that dynamic I don't
17 think really enters into the picture here because it's so
18 early in the process.

19 The last point I would like to make is with respect
20 to the trial. We have proposed a ten day trial. Plaintiffs
21 have proposed a three day trial. We don't think three days is
22 realistic. Again, we have to build in perhaps a day or two
23 because of the uncertainty, but also not knowing -- we will
24 have a jury, this will be a jury trial, and that will all take
25 time.

1 With the facial challenge, there could be fact
2 witnesses in addition to expert witnesses. Again, we just
3 don't know that much at this time, and so that's why we think
4 that it would be best to enter into a scheduling order, our
5 proposed timeline.

6 And one other point. This is something we should
7 raise. We may file a motion for summary judgment. It is
8 entirely possible that there won't be an opportunity, but we
9 do want to reserve the right to do that. I think we do need
10 to, you know, make sure that we've got the 120 days prior to
11 trial to do such things.

12 The law is evolving, it is changing, and that could
13 take out, it could support, or it could be negative toward the
14 state defendants' defense. It could be one or the other. We
15 don't know that at this point. I think the parties do need to
16 have that leeway for motions for summary judgment.

17 THE COURT: At the preliminary injunction hearing
18 did the parties present expert testimony?

19 MR. DEGRANDIS: We did not. At the preliminary
20 injunction hearing we accepted the allegations on their face
21 as true for the limited purpose of that hearing.

22 THE COURT: All right. And so does the state have
23 any experts already starting to be lined up? I mean, it's not
24 like you don't have any experts yet, right?

25 MR. DEGRANDIS: We have not engaged any experts.

1 We are starting to reach out to them now.

2 THE COURT: Okay. All right.

3 Thank you.

4 MR. DEGRANDIS: Thank you.

5 MR. ERCHULL: Thank you, your Honor.

6 I just want to address a couple of points very
7 quickly.

8 First, I want to make the point that the reason
9 that there's no answer to the first amended complaint from the
10 state defendants or no responsive pleading is because they
11 asked for more time to do so, and the other defendants have in
12 fact submitted responsive pleadings.

13 And as your Honor just mentioned, we submitted an
14 expert affidavit alongside our motion for preliminary
15 injunction and temporary restraining order, which is available
16 to the state defendants, when we initially filed the complaint
17 back in August. So they've had, you know, ample time with the
18 information about what experts we plan to present, and I would
19 have of course been forthcoming about any questions about
20 whether there was an intention to, you know, bring in more
21 experts.

22 THE COURT: Do you agree, though, that now with the
23 facial challenge that it makes the case a little bit more
24 complex?

25 MR. ERCHULL: I don't agree --

1 THE COURT: Even your expert may offer some
2 different information or you may have different experts?

3 MR. ERCHULL: No, no.

4 I'll try to address for you why I think that the
5 facial claim is the same, right?

6 I mean, our claim from the outset is that HB 1205
7 is both unconstitutional and violates Title IX, right?

8 And the reason that we have proffered in our
9 initial complaint and in our initial pleadings, including the
10 motion for preliminary injunction, was because it classifies
11 the law -- HB 1205, the sports ban, classifies based on
12 transgender status, and the facts that underlie our complaint
13 show why the state can't meet its burden to justify this
14 classification based on transgender status.

15 If you read Judge McCafferty's order on the motion
16 for preliminary injunction, it's very clear that based on the
17 facts that we presented and based on what the state presented
18 in opposition, that they were unable to meet a burden to show,
19 at least in terms of likelihood of success, that they could
20 overcome their legal obligation to show that the interests,
21 the state interests justify the classification based on
22 transgender status.

23 So the fact that it's a facial challenge versus an
24 as-applied challenge does not change that calculus at all, and
25 our expert affidavit says everything it needs to to support

1 the facial claim just as it does the as-applied claim.

2 THE COURT: Okay. And with regard to the trial
3 length, I mean three days, just explain that to me. That
4 seems like a really ambitious trial.

5 MR. ERCHULL: Yeah. Sorry. Thank you, your Honor,
6 for that question.

7 I just want to clarify that I'm happy to negotiate
8 about number of days of trial and how the discovery scheduling
9 plays out exactly. And, again, the tight timeline was really
10 all in an effort to try to get to final judgment before
11 September if at all possible.

12 The three day trial in my view -- you know, we have
13 witnesses to -- fact witnesses to put on, you know, with our
14 plaintiffs and potentially information about their medical
15 history that's been presented in the case, and then we have an
16 expert.

17 In my estimation it would make sense for the
18 defendants to have one expert, or if they want to have two
19 experts, but I don't see those elements, those, you know, fact
20 elements coming to more than two days of trial, and then of
21 course openings and closings. I don't see it taking more than
22 three days, but I'm happy to contemplate more days for a trial
23 that's more complicated.

24 THE COURT: And then with regard to the schedule of
25 trying to get a trial before the next school year starts, it

1 seems that the urgency is not as great anymore with the
2 preliminary injunction in place. I certainly understand that
3 other school districts might be wanting some direction, but
4 other school districts aren't in this case.

5 So the districts and the plaintiffs that are in
6 this case are protected to be able to play next year assuming
7 that the preliminary injunction is still in place.

8 MR. ERCHULL: Yes. We acknowledge that the two
9 individual named plaintiffs are in fact -- and this is not a
10 class action, right? The two individual main plaintiffs are
11 eligible to continue playing as long as they meet other
12 eligibility criteria for, you know, as long as the litigation
13 proceeds if the injunction isn't removed.

14 And we also are aware that, you know, for their
15 sake finality of this litigation is a benefit to them, and
16 we're also aware that the school district defendants have
17 represented that not even just for -- you know, it's not even
18 just the school district defendants who are named. Yes,
19 they're subject to the preliminary injunction but only with
20 respect to those two individual plaintiffs, and they want
21 clarity -- which they've represented to the Court already,
22 they want clarity beyond just these two specific plaintiffs,
23 and we understand that, and as we represented to the Court
24 from the beginning, we are prepared to move expeditiously
25 toward that end.

1 THE COURT: Is there any evidence, though, that
2 those two school districts have other students who would be
3 impacted by this?

4 MR. ERCHULL: I would defer to them, but no, I
5 don't have any evidence of that.

6 THE COURT: All right.

7 So you just heard from the state defendants that
8 they don't have any experts lined up. So I'm looking at your
9 expert disclosure deadline of next month which sounds like
10 it's not possible.

11 MR. ERCHULL: Yeah. I'm more than willing to be
12 flexible about that, but again with the aim of hopefully
13 reaching resolution of the matter prior to September.

14 THE COURT: All right.

15 Anything else, counsel?

16 MR. DEGRANDIS: Just a couple of very quick points.

17 As far as Attorney Erchull bringing up the reason
18 why we haven't filed a responsive pleading is because they
19 gave us time to extend that, I appreciate it. Thank you.
20 That is very important. There are a lot of moving parts, and
21 there's a lot to consider in this case.

22 The only other point I wanted to raise here was I
23 believe the expert declaration to which Attorney Erchull
24 refers, Dr. Shumer's, it was simply a declaration. It was
25 conclusory. He explained his position and why he believes

1 that his position, his understanding, his expertise supported
2 the motion for a preliminary injunction. It did not provide
3 data. It did not provide detail. And, please, someone
4 correct me if I'm wrong, but he also hadn't even interviewed
5 either one of the individual plaintiffs. That was very
6 preliminary. It was in support of the preliminary injunction.
7 It did not provide us with any information -- any additional
8 information regarding what an expert would opine to with
9 respect to the factual allegations made specifically.

10 THE COURT: Okay. Thank you.

11 All right. So I can give you my preliminary
12 thoughts on this.

13 I think that a schedule that tries to get this case
14 tried by the beginning of the school year next year is just
15 too ambitious for this case, but I also think that it doesn't
16 make sense given the preliminary injunction order that
17 discovery be stayed pending resolution of any responsive
18 pleading that the state defendants might file.

19 So I could do two things. I can revise the
20 schedule myself and find some time that is in between the
21 seven month difference that you all have or I can give you
22 guys another opportunity to chat amongst yourselves to see if
23 you can get a resolution in between that seven month trial
24 difference.

25 But what I would say in terms of some guidance is

1 that, you know, with regard -- it sounds like this is going to
2 be an expert-heavy case, and so having experts disclosed on
3 the same date doesn't really make sense in this type of case.
4 So I would have some kind of expert disclosure whether you
5 build it in to have rebuttal report deadlines for both
6 parties, however you want to build it in, but I think having
7 expert disclosures on the same date just probably doesn't make
8 sense in this case.

9 So, like I said, I'm happy to take the direction of
10 the parties. I can issue an order that gives you a schedule
11 or you can take another crack at it and get something back to
12 me within ten days of a new proposal.

13 MR. DEGRANDIS: I'm happy -- I think it's a
14 career-limiting move to ask the Court to do my work for me.
15 So I am happy to work with plaintiff's counsel, and hopefully
16 we can come up with something. I think that was good
17 direction, and we can work something out.

18 THE COURT: Yes. If you can. So let's just set a
19 deadline for ten days, and if you can't work something out,
20 just let my docket clerk know and we'll just get together for
21 a Zoom for whatever else you can't work out, and then I can
22 make the decisions. All right?

23 MR. DEGRANDIS: Thank you.

24 THE COURT: Does that make sense everybody?

25 MR. ERCHULL: Yes. Thank you, your Honor.

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MR. KLEMENTOWICZ: Thank you, your Honor.

THE COURT: Thank you all. Court is adjourned.

(Conclusion of hearing at 11:06 a.m.)

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings to the best of my ability and belief.

Submitted: 12-4-24 /s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR